No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1957

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS AND CONTRA COSTA COUNTY COMMUTERS ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES,

AND

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, AND THE GREYHOUND CORPORATION, APPELLEES IN INTERVENTION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on May 3, 1957, by a three-judge district court

convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission and denying appellants' motion for leave to amend the complaint. The order, issued pursuant to the provisions of Section 5 of the Interstate Commerce Act, approved an application (a) for Pacific Greyhound Lines (hereinafter referred to as Pacific) to acquire control of Golden Gate Transit Lines (hereinafter referred to as Golden Gate) through ownership of all the outstanding capital stock of the latter, (b) for the contemporaneous purchase by Golden Gate of certain operating rights, both interstate and intrastate, and other property of Pacific in exchange for the outstanding capital stock of Golden Gate, and (c) for the acquisition of concurrent control, along with Pacific, by the Greyhound Corporation (hereinafter referred to as Greyhound) of Golden Gate and of the operating rights and properties to be acquired by the latter.

On February 8, 1954, Greyhound, Pacific (at that time a subsidiary of Greyhound),[1] and Golden Gate filed with the Commission the above-mentioned application. At a hearing in April, 1954, appellants appeared and objected to the granting of the application on the grounds that the proposed transaction (1) was not within the scope of Section 5 of the Interstate Commerce Act, and (2) was not consistent with the

[1] Pacific and Greyhound have since been merged, but for purposes of clarity we retain the terminology used by the Commission and the court below, since the merger does not have impact on this case.

public interest. Thereafter, in October 1954, the examiner issued a proposed report recommending denial of the application on the ground that it was not consistent with the public interest. Objections to this proposed report were filed by applicants, following which the full Commission, on July 6, 1955, issued its report and order granting the application, subject to certain terms and conditions set forth in the order. A petition for rehearing and reconsideration was denied by the full Commission on September 19, 1955.

The complaint, which was filed October 18, 1955, challenged the order of the Commission solely on the ground that the transaction did not come within the scope of Section 5 and that the Commission therefore lacked jurisdiction. The United States and the Commission filed answers and moved for judgment on the pleadings. Appellees in intervention moved to dismiss the complaint for failure to state a claim. Argument was heard on these motions on February 23, 1956, when, for the first time, appellants indicated an intention to seek leave to amend their complaint in order to challenge the sufficiency of the Commission's findings of fact. This motion was filed February 28, 1956, and the court heard argument on it on April 20, 1956.

In its memorandum opinion of April 12, 1957, the court granted the motions of appellees and appellees in intervention, ordered the complaint dismissed with prejudice, and denied the motion to amend the complaint. In a separate opinion, Judge Harris concurred in the majority decision sustaining the jurisdiction of the Commission but dissented from the

refusal to grant appellants permission to amend their complaint.

ARGUMENT

I

THE COMMISSION HAD JURISDICTION OVER THE TRANSACTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT

Section 5 (2) (a) of the Interstate Commerce Act provides in relevant part that it shall be lawful, with the approval and authorization of the Commission, "for any carrier * * * to acquire control of another through ownership of its stock or otherwise." Both the Commission and the court below found that a transaction whereby a carrier (Pacific) proposed to transfer part of its intrastate and interstate operating rights to another company (Golden Gate), which thereupon would become a carrier, and, in exchange, would concurrently acquire control of the latter company through acquisition of its stock, required approval by the Commission under Section 5 (2) (a). This conclusion, which is consistent with prior decisions of the Commission in similar cases, with the judicial construction placed on a comparable provision of the Civil Aeronautics Act, and with decisions of this Court construing Section 5, raises no substantial question.

Involved in this proceeding are Pacific's suburban-commuter operating rights in the San Francisco Bay area, together with certain closely related interstate operating rights. The Commission's order found that it would be consistent with the public interest if the above operations were segregated from Pacific's

intercity long haul operations by placing the former under separate management. To permit this, the Commission approved the transfer of the largely local operating rights, together with certain properties, including $250,000 in cash, to Golden Gate, a separate and new corporation, which was not then a carrier but would become such on consummation of the transaction. The Commission also approved the simultaneous acquisition of control of Golden Gate by Pacific through ownership of all of its capital stock.

There is no suggestion in Section 5 (2) (a) that the Commission's jurisdiction to approve or disapprove intercarrier control relationships is limited by the method by which, or the time at which, such relationships are created. That the Commission's jurisdiction is not limited to transactions between carriers existing at the time the proposal is submitted, but includes those who will become carriers as a result of the transaction, is made plain by Section 5 (11) of the Act, which describes those subject to Section 5 as "any carrier or corporation participating in *or resulting from* any transaction approved by the Commission" (emphasis added). Admittedly, upon consummation of the transaction, Pacific (a carrier) would acquire control of Golden Gate (another carrier), and that jurisdictional fact is not altered because Pacific may have previously held the operating rights involved.

In the instant case the Commission ruled (65 M. C. C. 347, 358; Juris. Statement 41–42):

> It is apparent that if the transaction were accomplished without prior authority it would be in

violation of Section 5 (4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5.

As early as 1940, and continuously since then, the Commission has so construed the Act. *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M. C. C. 531 (1940) involved applications for authority for Columbia Terminals to acquire the capital stock of Columbia Motor, a new corporation, and for the latter to acquire from Terminals certain interstate and intrastate operating rights. There, as here, the purpose of the transaction was to permit separation in different but controlled companies of dual operations formerly conducted by a single entity. The Commission held (p. 534):

> As the proposed purchase by Motor Service of the previously described motor-carrier properties of Terminals and the contemporaneous acquisition of control of the former by the latter are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership, the matter is subject to our prior approval under section 213,[2] and our findings relate to the entire transaction. Compare *Boyle Bros., Inc.—Control—Speedway Transp. Co., Inc.*, 35 M. C. C. 45,

[2] Prior to the Transportation Act of 1940, acquisitions of motor carriers were governed by Section 213 of the Interstate Commerce Act. By that Act, Section 213 was deleted, and all acquisitions, regardless of the type of carrier, were put under Section 5, which originally applied only to railroads.

and *Clardy—Control—Bulk Haulers, Inc.*, 35 M. C. C. 93.

See also, *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M. C. C. 358 (1941); *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626 (1941); *Gehlhaus and Hollobinko—Control*, 60 M. C. C. 167 (1954).

The Commission's view that Section 5 (2) (a) is not limited to transactions between existing carriers, but applies as well to transactions which, when consummated, will result in one carrier acquiring control of another, finds support in judicial decisions under the comparable provision of Section 408 (b) of the Civil Aeronautics Act (49 U. S. C. 488 (b)), which provides that it shall be unlawful, unless approved by order of the Board, for any air carrier to acquire control of any air carrier in any manner whatsoever.

In *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d. 810 (C. A. 2, 1941), review was sought of an order of the Board which granted a certificate for temporary air transportation to American Export Airlines, Inc., but dismissed that part of the application which sought Board approval under Section 408 (b) of the control of applicant by its parent, American Export Lines. At the time of the application, American Export Airlines was not an air carrier, and the Board dismissed the application on the ground that the above section "applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier." The

Court of Appeals, in rejecting this interpretation, said (p. 815):

> In our opinion "to acquire control of any air carrier in any manner whatsoever" is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation.

Similarly, in *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board,* 197 F. 2d 384 (C. A. D. C., 1952), the court held that the statute confers on the Board jurisdiction not only over a carrier that is seeking control of another carrier already in existence, but also over all steps preliminary to bringing the second carrier into existence.

Finally, we submit that the Commission order finds support in the decisions of this Court which have consistently construed Section 5 as requiring Commission approval of transactions whereby one rail carrier, even though it already enjoys substantially complete control of another carrier through stock ownership or subsidiaries, acquires some form of new control of the existing operating rights of the latter. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *United States* v. *Marshall Transport Co.,* 322 U. S. 31; *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151. As this Court stated in *Breswick* (p. 169), "The crux of each inquiry * * * is the nature of the change in relations between the companies" and "the finding of the Commission that a given transaction does or does not constitute a significant increase in

the power of one company over another is not to be overruled so long as 'there is warrant in the record for the judgment of the expert body. * * *' *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146."

The Commission has recognized that the advantages of separate management for different types of motor transportation operations is a valid ground for the exercise of its powers under Section 5 (2) (a). In the instant case the Commission found that advantages in management consistent with the public interest would result from segregating into a separate company Pacific's short-haul commuter operations. Of paramount importance is the fact that Pacific will acquire legal and factual control of a new and separate carrier. It is submitted that the Commission's construction of Section 5 (2) is clearly justified if it is to "control rate and capital structures, physical makeup and relations between carriers, in the light of the public interest in an efficient national transportation system." *Schwabacher* v. *United States,* 334 U. S. 182, 192.[3]

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[3] Appellants' contention that under such a construction Section 212 (b) would become completely meaningless is without substance. Section 212 (b) applies only to transfers not covered by Section 5, as for example, a transaction involving less than 20 vehicles (Section 5 (10)) or a transfer which does not involve the acquisition of control of the transferee.

II

DENIAL OF THE MOTION TO AMEND WAS NOT AN ABUSE OF DISCRETION

The court below clearly did not abuse its discretion in denying appellants' motion to amend their complaint under Rule 15 (a) of the Federal Rules of Civil Procedure. While this rule is to be construed liberally, such a motion is not to be granted as a matter of course, but only "when justice so requires."

Appellants expressly disavow any negligence or inadvertence (Juris. Statement 18) and assert, in substance, that, in the absence of a showing of prejudice to other parties, it is an abuse of discretion for a district court to deny permission to amend at any time and for any purpose, even though the change represents an entirely new theory of action. On the contrary, the interests of justice would not be served by a construction of Rule 15 (a) which would permit *seriatim* attacks on Commission orders without any showing of lack of knowledge, mistake, inadvertence or justification. Such a construction would result in prejudicial delays contrary to the declared policy that Commission orders be speedily reviewed. *United States* v. *Griffin,* 303 U. S. 226. It would also prevent orderly consideration of cases by the courts.

We have been unable to find any case where, on similar facts, a motion to amend has been granted. On the other hand, the decision below accords with decisions of other courts where the motion was filed at the last moment and where the amendment sought to change the whole nature of the complaint. *Schick*

v. *Finch*, 8 F. R. D. 639, 640 (S. D. N. Y.); *Friedman* v. *Transamerica Corp.*, 5 F. R. D. 115, 116 (D. Del.); *In Re Hudson & Manhattan Railroad Company*, 229 F. 2d. 616, 621 (C. A. 2). In these circumstances, there is no warrant on this record for holding that the district court abused its discretion in refusing to permit an amendment to the complaint for the purpose of challenging the findings of fact of the Commission where the complaint had raised only the jurisdictional question, and where the first indication that such an amendment would be sought was during oral argument of the jurisdictional question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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